IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 15, 2005 Session

STATE OF TENNESSEE v. JEFFREY LYNN CULLEY

Appeal from the Criminal Court for White County
No. CR1178 Leon Burns, Jr., Judge

No. M2003-01758-CCA-R3-CD - Filed June 9, 2005

The defendant, Jeffrey Lynn Culley, was convicted of attempted burglary, a Class E felony, and vandalism under $500, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-14-402, -408. The trial court ordered concurrent sentences of four years for the attempted burglary and eleven months, twenty-nine days for the vandalism. In this appeal of right, the defendant argues that the evidence was insufficient and that his attempted burglary sentence is excessive. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Joe L. Finley, Jr., Assistant Public Defender, for the appellant, Jeffrey Lynn Culley.

Paul G. Summers, Attorney General & Reporter; Richard H. Dunavant, Assistant Attorney General; and John A. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At approximately 6:00 a.m. on July 14, 2002, Sergeant Travis Barker of the Sparta Police Department discovered the defendant breaking into the storage shed of a veterinary clinic located on North Spring Street. Sergeant Barker saw the defendant, whom he had known most of his life, "banging" the doorknob of the storage shed door with a crowbar. When the defendant saw Sergeant Baker, he cursed, picked up a plastic garbage bag, and ran into a thicket. The officer called for a bloodhound and an hour and one-half later, the defendant, who still had a bag in his hand, was flushed out of the industrial park area. An investigation established that both the front and rear doors of the veterinary clinic had been forcibly entered. The crowbar was never recovered.

At trial, Sparta Police Officer Jeff Hutson, who responded to radio transmissions, saw the defendant running through a field shortly after the offense. He stated that the defendant, upon seeing

him, turned and ran in a different direction but was soon caught. While placing the official charges of burglary and vandalism, the officer overheard the defendant say, "You think it's bad now; just wait."

Harold Blankenship of the Sparta Police Department, who examined the scene, testified that the front and rear doors of the veterinary clinic had been pried open by a crowbar or large screwdriver. He found that the examination room and office areas were in disarray and that there was damage to the door to the storage building, which was connected to the rear of the office by a breezeway. Officer Blankenship recalled that when the defendant was apprehended, he had a large plastic garbage bag containing "[a] pair of gloves, a shirt-type fabric and a[n] NHC empty tote bag." He determined that nothing appeared to have been stolen from the clinic and that the items in the defendant's garbage bag were unrelated to the clinic.

Dr. R.P. Cooke, who owned the veterinary clinic, testified that several dollars in change had been taken from a coin box. Otherwise, he did not find anything missing from the clinic.

The defense rested without putting on proof. Charged with burglary, the defendant was convicted of the lesser included offense of attempted burglary. He was charged and convicted of vandalism under $500.

I

Initially, the defendant contends that the evidence was insufficient to support his convictions. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

"A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault." Tenn. Code Ann. § 39-14-402(a)(1).

> "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense[,] . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense."

Tenn. Code Ann. § 39-12-101(a)(3). Vandalism occurs when "[a] person . . . knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that the person does not have the owner's effective consent is guilty of an offense under this section." Tenn. Code Ann. § 39-14-408(a).

The defendant argues that the evidence is insufficient because he did not have any items that "had anything to do with Dr. Cooke's office" in his possession at the time of his arrest. Although the defendant was caught at the scene of the crime, his argument appears to be, in effect, a challenge to the sufficiency of the proof offered to establish his identity as the perpetrator. Identity, of course, is an indispensable element of any crime. See generally White v. State, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975). Our law provides that identification of the perpetrator of a crime may be accomplished by either direct or circumstantial evidence, or both. State v. Thompson, 519 S.W.2d 789, 793 (Tenn. 1975). The determination of identity is a question of fact for the jury after consideration of all competent evidence. See Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696, 697 (1967); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958); State v. Crawford, 635 S.W.2d 704 (Tenn. Crim. App. 1982).

Here, the identity of the defendant was established by several witnesses. Sergeant Barker testified that upon investigating a "loud, banging" noise coming from the rear of the veterinary clinic, he saw the defendant striking the clinic's storage room door with a crowbar. He recognized the defendant, whom he had known personally and professionally for many years. When the defendant fled, he was in possession of a large plastic garbage bag. As he emerged from the woods some one and one-half hours later, he was still in possession of the bag. The defense made no claim of alibi. The evidence at trial established that the veterinary clinic had been forcibly entered and that several areas inside had been searched. Some change was missing. Although the door of the storage shed had not been entered, it had been damaged. While possession of recently stolen property is indicative of guilt, it is not essential. See, e.g., State v. Hamilton, 628 S.W.2d 742 (Tenn. Crim. App. 1982). The jury acted within its prerogative by accrediting the witnesses for the state. That function is solely within the province of the trier of fact. See, e.g., State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). The defendant is not, therefore, entitled to relief on this issue.

II

Next, the defendant contends that the trial court erred by failing to instruct the jury on criminal trespass as a lesser included offense of burglary. The state asserts that the issue is without merit because the trial court did in fact instruct the jury on criminal trespass. The record supports

the position of the state. See State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002); State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

III

Finally, the defendant contends that his attempted burglary sentence is excessive. He argues that the trial court failed to properly weigh the enhancement and mitigating factors. The defendant also asks this court to review the sentence under Blakely v. Washington, 542 U.S. ____, 124 S. Ct. 253 (2004). The state contends that the Blakely claim is waived.

At the sentencing hearing, Teresa Stinson, a probation officer with PSI, testified that the defendant was on probation for a theft conviction when he committed the offenses in this case. The trial court determined that the defendant qualified as a Range II offender and that enhancement factor (2), that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, was applicable. See Tenn. Code Ann. § 40-35-114(2). Additionally, without making reference to a specific enhancement factor by number, the trial court also considered that the felony was committed while the defendant was on probation from a prior felony conviction. See Tenn. Code Ann. § 40-35-114(14). There were no mitigating factors. The trial court ordered a sentence of four years, the maximum in the range. See Tenn. Code Ann. § 40-35-112(b)(5) (providing that a Range II sentence for a Class E felony is two to four years).

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving

both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Initially, the application of enhancement factor (14), that the felony was committed while the defendant was on probation from a prior felony conviction, would have been error. Although the defendant was on probation at the time of the offense, it was from a prior misdemeanor theft conviction rather than a prior felony conviction. Nevertheless, any error would be harmless. The trial court could have properly considered the defendant's prior probation revocations by the application of enhancement factor (9), that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See Tenn. Code Ann. § 40-35-114(9).

The weight to be assigned to the appropriate enhancement and mitigating factors falls within the sound discretion of the trial court so long as that court complies with the purposes and principles of the 1989 Sentencing Act and its findings are supported by the record. State v. Boggs, 932 S.W.2d 467, 475 (Tenn. Crim. App. 1996). The defendant has a fairly lengthy prior record, including multiple burglary convictions. There were no mitigating factors. Under these circumstances, a sentence of four years is appropriate.

The second sentencing issue is whether the defendant is entitled to relief under the ruling of Blakely v. Washington. In State v. Chester Wayne Walters, No. M2003-03019-CCA-R3-CD, slip op. at 21 (Tenn. Crim. App., at Nashville, Oct. 4, 2004, as corrected Dec. 10, 2004), this court rejected the state's assertion that the failure to present a Blakely challenge in the trial court operates as a waiver of the issue on appeal. Recently, however, in State v. Edwin Gomez and Jonathan S. Londono, No. M2002-01209-SC-R11-CD, slip op. at 17 (Tenn. April 15, 2005), a majority of our supreme court ruled that where a defendant has failed to preserve a Blakely challenge, he is limited to seeking relief by way of plain error review.

Prior to the decision in Gomez, this court had observed that the United States Supreme Court's opinion in Blakely called into question the continuing validity of our current sentencing scheme. In that case, the Court, applying the rule in Apprendi v. New Jersey, 566 U.S. 466, 490 (2000), struck down a provision of the Washington sentencing guidelines that permitted a trial judge to impose an "exceptional sentence" upon the finding of certain statutorily enumerated enhancement factors. The Court observed that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 2537. Finally, the Court concluded that "every defendant has a right to insist that the prosecutor prove to a jury [beyond a reasonable doubt] all facts legally essential to the punishment." Id. at 2543. The Gomez majority, however, concluded that "[u]nlike the statutes at issue in Blakely and Booker, a judicial finding of an enhancement factor in Tennessee does not affect the range of punishment to which a defendant is exposed." Gomez and Londono, slip op. at 25.

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE